

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN A. PATTERSON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 5:17-CV-00467
)	
DEFENSE POW/MIA ACCOUNTING)	
AGENCY, et al.,)	
)	
Defendants.)	

**DEFENDANTS' UNOPPOSED MOTION FOR LEAVE TO FILE SUR-RESPONSE TO
PLAINTIFFS' REPLY IN SUPPORT OF ADVISORY TO COURT**

Defendants, the Defense POW/MIA Accounting Agency (DPAA), the U.S. Department of Defense (DoD), the American Battle Monuments Commission, and the heads of those agencies sued in their official capacity (collectively "Defendants"), respectfully move for leave to file a sur-response to Plaintiffs' Reply in Support of Advisory to Court Concerning the Production and Examination of Remains, ECF No. 44 (Aug. 24, 2018). Undersigned counsel conferred with Plaintiffs' counsel on August 30, 2018, who stated that Plaintiffs do not oppose this motion.

There is good cause to grant Defendants' motion. Plaintiffs lacked any basis in the local or federal rules to file their eight-page "reply" as of right,¹ nor did they seek leave of court or

¹ Plaintiffs' Advisory was filed at the invitation of the Court. *See* Hr'g Tr. at 59:4-7, June 27, 2018 (stating that Plaintiffs' submission addressing the Court's questions from the hearing would be "entertain[ed] as part of the briefing on this matter"). Defendants, after consulting with Plaintiffs' counsel, sought and received specific leave of court to respond to Plaintiffs' Advisory. *See* Minute Order, July 18, 2018; Defs.' Mot. for Leave to Respond to Plaintiffs' Advisory to the Court Concerning the Production and Examination of Remains, ECF No. 41 (July 17, 2018).

meet and conferred with undersigned counsel, as required by Local Rule CV-7(f) & (i).

Moreover, Plaintiffs make unsupported and inaccurate factual claims that are prejudicial to Defendants. Instead of moving to strike Plaintiffs' filing, Defendants seek leave to file the brief response attached as Exhibit A to address five discrete assertions in Plaintiffs' reply:

- “the Government has admitted that most of the Families’ claims are likely true,” Pls.’ Reply, ECF No. 44 at 1;
- “[PFC Kelder’s] family has only received three bones,” *id.* at 3;
- “the Government accepted the fact that the remains [of PFC Lawrence Gordon] had been identified by the independent researcher,” *id.* at 4
- the Government has repeatedly advised that they intend to disinter all of the unidentified remains at Manila American Cemetery,” *id.* at 6; and
- “in October 2017 . . . [DPAA] removed remains from a tomb at the Catholic Church in Abucay, Bataan, Republic of the Philippines . . . to Hawaii without proper permits and without the permission of the Church,” *id.* at 8.

Each of these factual claims and characterizations is false. The last of these is the most egregious. On the basis of “information and belief,” unsupported even by a declaration from an individual who holds such a belief, Plaintiffs accuse DPAA of flouting legal requirements in conducting a disinterment that is not at issue in this case. Because it would be prejudicial to Defendants to leave unaddressed these inaccuracies and mischaracterizations in Plaintiffs' filing, the Court should grant Defendants' request for leave to file the attached sur-response.

CONCLUSION

For all these reasons, Defendants respectfully request that the Court grant Defendants' motion for leave to file the attached sur-response.

Dated: August 30, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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